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No. 96-1268

In The

Supreme Court of the United States

October Term, 1996

THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

vs.

BONNIE SONNENFELD, individually and on behalf of all those similarly situated, KARL NICOLETTI, on behalf of himself and all others similarly situated, HILDA EBLING STOLLER TRUST, by Hilda Stoller a/k/a Hilda Stoller Milstein, Trustee, and LARRY RABINOWITZ, on behalf of himself and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

KEVIN J. YOURMAN
MATTHEW J. ZEVIN
WEISS & YOURMAN
10940 Wilshire Boulevard
24th Floor
Los Angeles, CA 90024
(310) 208-2800

SHERRIE R. SAVETT
Counsel of Record
GENNA D. KIDD
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Attorneys for Respondents

70969 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 100 F.3d 744 (1996).

STATEMENT OF JURISDICTION

While this Court has jurisdiction to review the Tenth Circuit's opinion and judgment pursuant to 28 U.S.C. § 1254(1), Respondents submit that the interlocutory nature of the judgment below militates against the exercise of certiorari jurisdiction. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

STATEMENT OF THE CASE

A. Introduction

This case arises out of Denver's issuance of statements, including offering statements for the sale of airport revenue bonds, which misrepresented and concealed material facts regarding Denver International Airport. The case was brought as a class action by purchasers of the bonds after news reports published in February, 1995 disclosed the existence of more than a dozen federal and state investigations into possible fraud and other wrongdoing committed in connection with the construction of the airport. Respondents alleged that Denver and certain other defendants violated Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 promulgated thereunder by failing to disclose known, extensive design and construction problems that would necessarily require delays in the airport's opening. Respondents and the other members of the class alleged that as a result of the omissions and misrepresentations, they paid artificially high prices for their bonds and did not receive adequate yields on the bonds to compensate them for these undisclosed risks.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

A. The District Court's Ruling

Denver first asserted that it is not subject to the federal securities laws in the district court, arguing in an April, 1995 motion to dismiss that it alone, out of the universe of "persons" subject to Section 10(b), is not subject to private actions. The district court rejected Denver's argument, holding that the plain language of the 1934 Act, together with the well-established private right of action under Section 10(b), clearly imposes Section 10(b) liability on municipal issuers.

The district court, following the well-reasoned decisions in *In re Citisource, Inc. Sec. Litigation*, 694 F. Supp. 1069 (S.D.N.Y. 1988) and *In re Washington Pub. Power Supply System Sec. Litigation*, 623 F. Supp. 1466 (W.D. Wash. 1985), *aff'd*, 823 F.2d 1349 (9th Cir. 1987), recognized, first, that the clear text of Section 10(b) prohibits the use, by "*any person*," of any manipulative or deceptive device in connection with the purchase or sale of any security. 15 U.S.C. § 78(j)(b). In 1975, Congress amended the 1934 Act, explicitly extending the definition of "person" contained in Section 3(a)(9) of the 1934 Act (15 U.S.C. § 78c(a)(9)) to include a "government or political subdivision, agency, or instrumentality of a government." This definition applies, by its terms, to all aspects of the 1934 Act, including Section 10(b), and is incorporated into Rule 10b-5 by Rule 0-1(b). 17 C.F.R. § 240.01(b).

The district court further recognized that when Congress amended the definition of "person" in 1975 to include governmental issuers, it did so against a backdrop of nearly 30 years recognition of a private damage action under Section 10(b). *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380

(1983). The district court also considered the intent of Congress, wisely reasoning that "it would be hard to accept that Congress did not want municipalities to be truthful in issuing their bonds." The district court thus concluded that the unambiguous statutory language, viewed in light of the indisputable recognition at the time of the 1975 amendments of a private cause of action under Section 10(b), establishes that municipal issuers are subject to the broad antifraud prohibition contained in Section 10(b).

B. The Court of Appeals Opinion

Denver appealed to the Tenth Circuit, which properly affirmed the district court's denial of its motion to dismiss. The Tenth Circuit agreed with the district court that the definition of "person" contained in Section 3(a)(9) "clearly mak[es] it unlawful under § 10(b) for issuers of municipal bonds to use or employ any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security." 100 F.3d at 746. It also agreed that "the existence of an implied private cause of action under § 10(b) and Rule 10b-5 is so well established in the courts that its existence is 'beyond peradventure.' " *Id.* (*quoting Huddleston*, 459 U.S. at 380). The Tenth Circuit further recognized that virtually all of the courts and commentators agree that by expressly including governments and political subdivisions in the definition of "person" in Section 3(a)(9), Congress subjected municipalities to private suits for damages under Section 10(b). *Id.* at 746-47.

While expressing agreement with the reasoning of the district court, *Citisource*, and *Washington Public Power*, the Tenth Circuit made clear that the central focus of its own analysis would be whether Congress intended to create a private cause of action against municipalities. 100 F.3d 747. Closely adhering to the precedents of this Court, the Tenth Circuit reasoned that

"[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted — the 'contemporary legal context' existent when the new law was enacted." (*citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982)). The Tenth Circuit explained that where, as here, Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, the question becomes "whether Congress intended to preserve or, in this case, to extend the preexisting remedy." 100 F.3d at 747. In such a situation, "Congress need not have intended to create a new remedy since one already existed." *Id.*

Applying the reasoning of *Merrill Lynch* to this case, the Tenth Circuit determined that at the time of the 1975 amendments, federal courts — including this Court — routinely found implied private causes of action in statutes that did not expressly provide them. 100 F.3d at 747. It therefore concluded that in the "contemporary legal context" of 1975, Congress intended, by amending the 1934 Act's definition of "person", to continue to subject municipalities to the then well-established private right of action under Section 10(b). *Id.*

The Tenth Circuit bolstered its analysis with the legislative history, which reveals that while Congress intended with the 1975 amendments to exempt municipalities from SEC registration and reporting requirements applicable to private sector offerings, Congress "also clearly intended that municipal securities would remain subject to the antifraud provisions." 100 F.3d at 748. The lack of explicit language in the legislative history regarding the availability of a private cause of action against municipalities is not anomalous, the Tenth Circuit explained, because at the time of the 1975 amendments there was authority suggesting municipalities could be subject to the

well-established private cause of action under Section 10(b). *Id.* Thus, "[i]n the contemporary legal context of 1975, Congress may well have considered the change in the definition of person a clarification of existing law rather than a change." *Id.* at 749.

The Tenth Circuit, based on this cogent analysis, correctly concluded that Congress intended by the 1975 amendments to recognize an implied private cause of action against municipalities under Section 10(b) and Rule 10b-5. *Id.*

REASONS FOR DENYING THE WRIT

Respondents respectfully submit that this case is not one which requires exercise of this Court's extraordinary and discretionary certiorari jurisdiction. Review in this case is unsupported by any of the compelling circumstances normally required for granting certiorari.

Petitioner does not contend that the Tenth Circuit's decision conflicts with a decision by another court of appeals, or that the Tenth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Moreover, Petitioner's efforts to create a "conflict" between the Tenth Circuit's opinion and the opinions of this Court are unavailing. The Tenth Circuit's decision is entirely consistent with the rulings of this Court, and is also in accord with the vast majority of district courts and commentators that have considered the question of a municipality's liability under Section 10(b).

Further, the issue raised is not of sufficient "importance" and urgency that resolution by this Court is necessary. The purported "serious adverse effects" Petitioner claims will flow from subjecting municipalities to private actions under Section

10(b) are wholly illusory. Subjecting municipalities to private Section 10(b) liability furthers the fundamental purposes of the federal securities laws — protecting the investing public, promoting public confidence in our capital markets, and deterring wrongdoing.

Finally, as noted above, the interlocutory nature of the Tenth Circuit's decision makes review inappropriate at this time.

I.

THE TENTH CIRCUIT'S DECISION ADHERES TO THE PRECEDENTS OF THIS COURT, IS IN ACCORD WITH DISTRICT COURT AND SCHOLARLY AUTHORITY, AND IS CLEARLY CORRECT.

In an apparent attempt to create a "conflict" between the decision below and decisions of this Court, Petitioner asserts that the Tenth Circuit "has changed the test for determining whether there is an implied private right of action under a statute." Petition at 11. However, the Tenth Circuit's conclusion that municipal issuers are subject to private actions under Section 10(b) was firmly grounded on, and is fully consistent with, the precedents of this Court, as well as the overwhelming weight of district court and scholarly authority.

Petitioner concedes that the Tenth Circuit properly acknowledged that in determining whether a private cause of action is implicit in a statute, "the central inquiry is whether Congress intended to create a private cause of action." 100 F.3d at 747. Petitioner's only complaint is that in pursuing its analysis of congressional intent, the Tenth Circuit improperly relied on this Court's decision in *Merrill Lynch*, and "erroneously" "picked out one statement from the legislative history . . . to support its position, and ignored the rest of that history." Petition at 17-18. In essence, Petitioner argues that the only useful indicator of

congressional intent is the legislative history of the 1975 amendments, and that by not relying on the snippets of legislative history Petitioner has "picked out" to support *its* position, the court of appeals "erred." These arguments are legally unsound and provide no basis for this Court to grant review.

Initially, this Court has never held that legislative history is the only means of discerning congressional intent where, as here, the statutory language is clear and where Congress acted in a statutory context in which an implied private remedy had already been recognized by the courts. If anything, recent decisions of this Court cast doubt on the value of legislative history as an interpretive device. In *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994), this Court made clear that strict adherence to the statutory language must be "the starting point in every case involving construction of a statute," and that particularly in determining the scope of Section 10(b), "the text of the statute controls." 114 S. Ct. at 1447. Here, the Tenth Circuit recognized the clear language of Section 3(a)(9) defining "person" to be the strongest manifestation of congressional intent when it stated that "by expressly including governments and political subdivisions in the definition of person, Congress subjected municipalities to § 10(b) and the well-established private cause of action under that section." 100 F.3d at 746.[1] The Tenth Circuit also properly followed this Court's teaching in *Merrill Lynch* that when Congress acts in a statutory context in which an implied private

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1. Petitioner's characterization of the Tenth Circuit's opinion as having relied on "congressional inaction," Petition at 15, is patently inaccurate. Explicitly amending the 1934 Act's definition of "person" to include municipalities hardly qualifies as congressional "inaction." Congress affirmatively and unambiguously took action to extend the Section 10(b) private action to municipalities when it enacted this definitional change, and the Tenth Circuit's reliance on such a clear manifestation of congressional intent was most proper.

remedy has already been recognized by the courts, the inquiry shifts from whether Congress intended to create a new remedy to whether Congress intended to *preserve* the preexisting remedy. *See Merrill Lynch*, 456 U.S. at 378-79. The Tenth Circuit found that in the "contemporary legal context" of the 1975 amendments, the private right of action under Section 10(b) was firmly established and that at that time, the courts readily found implied causes of action. 100 F.3d at 747. Moreover, at the time of the 1975 amendments, there was district court authority suggesting that municipalities were proper defendants under Section 10(b), *e.g. Baron v. Shields*, 131 F. Supp. 370 (S.D.N.Y. 1954), and the SEC was also of the view that municipal issuers were subject to Section 10(b) liability.[2] 100 F.3d at 748. The

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2. Petitioner asserts, incorrectly, that "there had never been any judicial recognition of a private remedy against municipalities." Petition at 14. While the Tenth Circuit cited, as one example, the *Baron* decision, several other pre-1975 federal securities cases similarly recognized a Section 10(b) private right of action against municipal defendants. In *Thiele v. Shields*, 131 F. Supp. 416, 419-20 (D.N.Y. 1955), a private Section 10(b) case brought against the Bellevue Nebraska Bridge Commission, among others, the court recognized an implied cause of action against municipal officials involved in a bond offering by the Bridge Commission. The court rejected the proposition that, because Congress had expressly exempted municipal bonds from civil liability under Section 12(2) of the 1933 Act, Congress must have also intended to exempt municipal bond sales from all of the other antifraud provisions of the Act. *Id. See also, e.g., International Ladies' Garment Workers' Union v. Sheilds & Co.*, 209 F. Supp. 145, 147 (S.D.N.Y. 1962) (in action against chairman of Bellevue Nebraska Bridge Commission, holding that "the [1934] act creates liability with respect to sales of bonds, even though they be bonds of public instrumentalities of a state"); *Greenwich Sav. Bank v. Shields*, 131 F. Supp. 368, 369 (D.N.Y. 1955) (plaintiff bondholder stated a claim against chairman of the Bridge Commission "regardless of the governmental character of the issuer of the bonds"); *Connecticut Mut. Life Ins. Co. v. Shields*, 131 F. Supp. 363 (D.N.Y. 1954) (complaint stated a claim under Section 10(b) against chairman of Bridge Commission); *Citizens Casualty Co. v. Shields*, [1954 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90, 683 (S.D.N.Y. Nov. 9, 1954) (same).

Tenth Circuit determined that under these circumstances, "Congress intended . . . to recognize an implied private cause of action against municipalities." 100 F.3d at 749.

Petitioner does not advance any credible reason why *Merrill Lynch* should be disregarded, but argues simply that "reliance on *Merrill Lynch* was unwarranted in this case" because the legislative history here does not (in Petitioner's view) support the conclusion that Congress was "preserving a preexisting remedy" when it redefined "person" in 1975. Petition at 13-14. While Petitioner acknowledges that the use of legislative history in statutory interpretation has come under increasing attack in recent years, Petition at 22, Petitioner nevertheless insists that legislative history here "compels the conclusion" that municipalities are exempt from private Section 10(b) actions. *Id.* at 23. Having concluded that legislative history is the key to discerning congressional intent, Petitioner then makes the curious request for "guidance from the Court as to how legislative history may be used to divine congressional intent." Petition at 23.

Preliminarily, Respondents submit that this Court has provided more than enough "guidance" on the uses of legislative history as an interpretive tool. Most recently, *Central Bank* established that the text of the statute itself is the best evidence of congressional intent, and that clear statutory language, standing alone, may "resolve" an issue of statutory construction, making reference to legislative history unnecessary. 114 S. Ct. at 1148.

Given the persuasive evidence that Congress intended to preserve a private cause of action against municipal issuers when it explicitly amended the statutory definition of "person" to include municipalities, it is unnecessary to resort to legislative

history in this case. The Tenth Circuit's review of that history, however, further demonstrates that while Congress did not intend to subject state and local governments to pre-offering registration and reporting requirements imposed on other participants in municipal securities offerings, "Congress also clearly intended that municipal securities would remain subject to the antifraud provisions." 100 F.3d at 748.[3] As the Tenth Circuit noted, the lack of discussion in the legislative history about the private cause of action against municipalities is not unusual, given the recognition of such a remedy by the SEC and the judiciary. *Id.*

Tellingly, Petitioner is unable to locate in the legislative history any language explicitly excluding municipalities from the reach of the Section 10(b) private action. Instead, Petitioner relies on the fact that Congress amended Section 15B of the 1934 Act to prohibit imposition of any pre-issuance filing requirements, by either the SEC or the newly created Municipal Securities Rulemaking Board ("MSRB"), on municipal issuers. However, Petitioner concedes that these amendments, known collectively as the Tower Amendments, merely exempted municipal issuers from *pre-offering registration and reporting requirements* of the federal securities laws. The Tower Amendments had absolutely nothing to do with antifraud liability, and do not in any way "compel" the conclusion that

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3. The Tenth Circuit quoted the Senate Report to the 1975 amendments, which states: "*Apart from the general antifraud provision*, municipal securities are exempt from all substantive requirements." Petitioner's Appendix D at 21 (emphasis added). The Senate Report also makes clear that while "the [1975] legislation would not permit any such pre-filing requirements, all documents and materials utilized in connection with the sale [of municipal securities] *would remain subject to the antifraud provisions of the Exchange Act.*" Petitioner's Appendix D at 23 (emphasis added). Contrary to Petitioner's arguments, there is nothing in the Senate Report or elsewhere in the legislative history to suggest that Congress intended to limit the 1975 redefinition of "person" to SEC enforcement actions under Section 10(b).

municipalities are immunized from private liability under Section 10(b).[4]

The Tenth Circuit's reluctance to glean from the "limited legislative history" a congressional intent to exempt municipalities from the scope of the private right of action under Section 10(b) was wholly consistent with the precedents of this Court, and is also in accord with the decisions of federal district courts that have considered the issue. Both *Washington Public Power* and *Citisource*, cases relied upon by the Tenth Circuit, squarely hold that municipalities are subject to Section 10(b) and Rule 10b-5 private liability.

In *Washington Public Power*, the court considered the very question Petitioner raises here: "whether there is a private right of action against municipal participants under § 10(b) of the 1934 Act." 623 F. Supp. at 1478.[5] The court held that the clear language of Section 3(a)(9) subjects municipalities to liability under Section 10(b), reasoning that "the language of the statute itself [is] the best guide to Congressional intent [.]" 623 F. Supp. at 1479. While the court found the parties' arguments based on legislative history to be "interesting," it concluded that legislative

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4. One commentator remarked that the legislative history of the Tower Amendments should "effectively rebut any argument that the Tower Amendment is intended in some way to undermine the application of Section 10(b) . . . to issuers of municipal securities." *See* Thomas P. Peacock, *A Review of Municipal Securities Laws as Amended by the Securities Acts Amendments of 1975*, 31 Bus. Law. J. 2037, 2061 (1976).

5. The *Washington Public Power* case arose out of the Washington Public Power Supply System's default on $2.25 billion outstanding municipal bonds. 623 F. Supp. at 1470. The municipal defendants included nine Washington cities, seven Oregon cities, and five Idaho cities, as well as several public utility districts and individual municipal officials. *Id.* at 1476 n.4.

analyses did "not compel the Court to disregard the clear language of the statute as amended." 623 F. Supp. at 1478-79.[6]

In *Citisource*, the District Court for the Southern District of New York was confronted with the issue of whether a municipality that does not even issue securities may nevertheless be subject to private liability for violations of Section 10(b). The *Citisource* court held that in light of the "well established existence in 1975 of an implied right of action under Section 10(b) and Rule 10b-5," 694 F. Supp. at 1073, and the 1975 amendment's explicit inclusion of municipalities in the definition of "person," both issuing and non-issuing municipalities are subject to the private right of action under Section 10(b). *Id.* at 1074. The court specifically noted that the legislative history revealed an intent "to improve efficiency, responsiveness and fairness in the operation of the securities markets and to improve investor protection," *id.* at 1074, and that imposing Section 10(b) liability on municipalities "appears to be consonant with these purposes." *Id.* (citations omitted).

The Tenth Circuit also correctly noted that, in addition to the federal district courts, "[m]ost commentators have concluded the 1975 amendment subjects municipalities to a private cause of action under § 10(b)." 100 F.3d at 746 (citing authorities). Moreover, the SEC has repeatedly confirmed that, in its view, "issuers are primarily responsible for the content of their disclosure documents and may be held liable under the federal securities laws for misleading disclosures." *Municipal Securities Disclosure*, Securities Exchange Act Release No. 34-26985, 54

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6. The Ninth Circuit, in its decision affirming the district court in *In re Washington Public Power Supply System Sec. Litigation*, 823 F.2d 1349 (1987), merely declined to address whether an action under *Section 17(a)* would lie against a municipality. *Id.* at 1358. The Ninth Circuit did not, as Petitioner suggests, question the district court's holding that municipal issuers are liable to private plaintiffs for violations of Section 10(b).

F.R. 28799, Fed. Sec. L. Rep. ¶ 25,098, at p. 18,199-10 n. 84 (June 28, 1989).[7]

In sum, the Tenth Circuit's decision is clearly correct and is entirely consistent with the precedents of this Court, as well as the conclusion of the vast majority of district courts, commentators, and the SEC, virtually all of whom have found that there is a private right of action under Section 10(b) against municipal issuers. Given the complete absence of "conflicting" decisions, and the great unanimity of opinion on this issue, review by this Court is wholly unwarranted.

II.

THE RESULT REACHED BY THE TENTH CIRCUIT IS CORRECT AS A MATTER OF POLICY, AND THE ISSUE PRESENTED IS NOT SUFFICIENTLY "IMPORTANT" TO WARRANT THIS COURT'S ATTENTION.

The Tenth Circuit's decision is not only correct as a matter of law, but makes sense on a practical and policy level. The policy arguments advanced by Petitioner are based primarily on hypothetical scenarios of the "hardships" that may befall local governments if the court of appeals' decision is not reversed, and do not rise to the level of national "importance" required for review. *See* Sup. Ct. R. 10(c). In fact, any result other than the one reached by the Tenth Circuit would have a devastating

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7. Upon learning of the Tenth Circuit's ruling, SEC general counsel Richard Walker reportedly stated: "The commission has long taken the position that the securities laws' antifraud provisions apply to municipalities, . . . [b]ut some municipalities have argued they are not subject to the antifraud provisions. This case reinforces the position that they are." Lynne Stevens Hume, "Appeals Court Won't Dismiss Class Action Suits Against Denver," *The Bond Buyer*, Nov. 15, 1996, at 5.

impact on the municipal securities market, the participants in which have long considered municipal issuers to be subject to the antifraud provisions of the federal securities laws.

As Petitioner points out, the dollar volume of municipal bonds issued in recent years has grown substantially. Petition at 25. At the same time, instances of corruption and fraud in the municipal securities market have become almost commonplace. One commentator remarks that "[t]he front page of *the Bond Buyer*, a daily trade newspaper, often reads like a local crime beat column." Ann Judith Gellis, *Municipal Securities Market: Same Problems - No Solutions*, 21 Del. J. Corp. L. 427, 428 (1996).[8] Under these circumstances, providing municipal issuers with a refuge from liability for false and misleading statements would clearly be contrary to what the SEC has identified as an "overriding federal interest in assuring that there is adequate disclosure of all material information by issuers of municipal securities." "Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others," Securities Act Release No. 7049, Exchange Act Release No. 33741, FR-42, Fed. Sec. L. Rep. (CCH) ¶ 72,442, at p. 62,195 (March 9, 1994).

Petitioner's assertion that permitting private litigation under Section 10(b) against municipal issuers will somehow "impede" the purposes of the antifraud provisions, Petition at 24, is unpersuasive. First, Petitioner's argument is contradicted by the fact that, at least for the past 22 years, neither the federal courts nor the SEC have suggested that imposing private liability on municipal issuers has detracted from the 10b-5 private action

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8. Some of the more prominent municipal bond fiascos include the near default of New York in 1975 on $600 million of debt, the 1988 default of Washington Power Supply System on over $2 billion of outstanding bonds, and the recent Orange County, California bankruptcy and near default on $800 million of short-term debt due the summer of 1995. *See id.*

or interfered with the effective operation of the securities laws. *See generally, Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 113 S. Ct. 2085, 2092 (1993). Second, any concerns about possible abuses of the Rule 10b-5 action have been eliminated by Congress's passage of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in 15 U.S.C.A. §§ 77 z-1, z-2; 78 u-4, u-5 (Supp. 1996) and other sections of 15 U.S.C.A.)[9] Because Congress has already addressed any perceived problems with "meritless" 10b-5 actions, there is no reason for this Court to entertain Petitioner's hypothetical argument that municipalities may be unique targets for abusive suits.

Permitting private damage actions against municipalities "will best promote the primary objective of the federal securities laws — protection of the investing public and the national economy through the promotion of 'a high standard of business ethics . . . in every facet of the securities industry.' " *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985) (*quoting SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963)). Allowing private actions against municipal issuers will also "promote clarity, consistency and coherence for those who rely upon or are subject to 10b-5 liability." *Musick, Peeler*, 113 S. Ct. at 2090. It is undisputed that the professionals involved in municipal securities transactions — including underwriters, dealers and brokers — are subject to Section 10(b) liability. *See* Petition at 20. Reversing the Tenth Circuit's decision

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9. Congress, in explaining the goals of the Reform Act, confirmed that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 31 (1995).

would lead to the absurd result that every person involved in a municipal bond transaction could be sued by a private plaintiff for violations of Section 10(b) — *except* the issuer itself, the "person" most responsible for making accurate disclosures about the securities it sells. Furthermore, any finding that issuers are not liable for their disclosures would likely make broker-dealers reluctant to underwrite or sell an issuer's bonds. According to Christopher Taylor, Executive Director of the MSRB: " 'Dealers would have to immediately reexamine what they would be willing to do and not do in this market because their liability would increase substantially if they were selling securities where there is no guarantee that the information supplied by the issuer is truthful[.]' " Lynne Stevens Hume, "Denver's Challenge to Antifraud Laws Could Hurt Market," *The Bond Buyer*, Dec. 14, 1995, at 1.[10]

Permitting private actions for damages against municipalities also provides " 'a necessary supplement' to Commission action." *Bateman Eichler*, 472 U.S. at 310 (*quoting J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Petitioner asserts — without any factual support — that SEC enforcement actions provide investors with adequate protection from fraud on the part of municipal issuers. However, there is no reason to believe that the SEC has sufficient resources or incentives to effectively police the municipal securities industry. One commentator has found that during the years 1989 through 1994, there were *no* Rule 10b-5 actions brought by the SEC against municipalities as issuers. Gellis, 21 Del. J. Corp. L. at 468. Incredibly, neither the New York City nor the Washington Public Power investigations resulted in actions for fraud against the

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10. The Executive Vice President of the Public Securities Association, Micah Green, reportedly agrees that "[w]ere the antifraud statutes not to apply to one of the participants [in a municipal bond transaction], that would raise uncertainty and risk in the marketplace which would ultimately be reflected in greater costs to that participant[.]" *Id.*

issuers by the SEC, "despite lengthy reports which would have supported an action." *Id.* And the SEC's investigation of the Orange County debacle was settled without any monetary fines against the municipal defendants. *Id.* The limited ability of the SEC to detect and prosecute municipal issuer frauds makes it particularly important that investors retain the ability to wield that " 'most effective weapon in the enforcement' of the securities laws" — the Rule 10b-5 private action. *Bateman, Eichler*, 472 U.S. at 310 (*quoting Borak*, 377 U.S. at 432)).

Petitioner's remaining policy arguments are equally unpersuasive. The notion that imposing antifraud liability on municipalities somehow "intrudes" on the affairs of local governments is, as the *Washington Public Power* court remarked, especially "difficult to accept":

> Application of the antifraud provisions of the federal securities statutes to the activities of municipal corporations, which is at issue here, involves only the requirement that municipalities be held to the same disclosure standards as other participants in municipal bond transactions. It is difficult to accept the argument that requiring that municipalities not be fraudulent in their activities somehow "interferes with their abilities to structure integral operations in areas of traditional governmental functions."

623 F. Supp. at 1477 (*quoting National League of Cities v. Usery*, 426 U.S. 833, 852 n.7 (1976)).[11] Moreover, the fact that investors

11. Denver cites *In re New York City Municipal Sec. Litigation*, 507 F. Supp. 169, 185-86 (S.D.N.Y. 1930), in support of its argument that having to be truthful when it issues bonds would "interfere" with the day-to-day conduct (Cont'd)

in municipal securities may have state law causes of action against issuers does not mean that municipalities should be excluded from the reach of the established private right of action under Section 10(b). *See Borak*, 377 U.S. at 434.

The Tenth Circuit's holding that municipal issuers, like all other participants in the municipal securities market, must remain liable to investors for violations of Section 10(b) and Rule 10b-5, can only advance the public interest. The burgeoning volume of the municipal securities market attests to the fact that municipalities have not been, and will not be, stifled in their efforts to raise capital through the issuance of new bonds, despite the existence of a private right of action against municipalities for violations of Section 10(b). Because the "hardships" Petitioner complains of are purely hypothetical, and because the public interest is promoted by the Tenth Circuit's conclusion that investors may bring actions for violations of Section 10(b) against municipal issuers, this case does not raise a question of sufficient "importance" to warrant resolution by this Court.

(Cont'd)
of a local government. The district judge's opinion in that case, however, is directly contradicted by that same court's later decision in *Citisource*, 694 F. Supp. at 1073. The *Citisource* court explicitly rejected the proposition that imposing Section 10(b) liability on municipal issuers is bad policy, and noted that the *N.Y.C. Mun. Sec. Litigation* case should be read in context, as "it was decided at a time when NYC was facing a serious threat of bankruptcy." 694 F. Supp. at 1074 n.7.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SHERRIE R. SAVETT
Counsel of Record
GENNA D. KIDD
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

KEVIN J. YOURMAN
MATTHEW J. ZEVIN
WEISS & YOURMAN
10940 Wilshire Boulevard
24th Floor
Los Angeles, CA 90024
(310) 208-2800

Attorneys for Respondents